

1-1-1964

Cultural Relativism, and Aid in the Legal Development of New Nations; Note

Henning Wegener

Follow this and additional works at: http://scholarship.law.nd.edu/nd_naturallaw_forum



Part of the [Law Commons](#)

Recommended Citation

Wegener, Henning, "Cultural Relativism, and Aid in the Legal Development of New Nations; Note" (1964). *Natural Law Forum*. Paper 83.

http://scholarship.law.nd.edu/nd_naturallaw_forum/83

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Natural Law Forum by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTES

CULTURAL RELATIVISM, AND AID IN THE LEGAL DEVELOPMENT OF NEW NATIONS

I. THE PRESENT DILEMMA

Independence has confronted the legal profession in the newly emancipated states with a task: a task indigenous lawyers can hardly solve in isolation from world legal science at large. It now appears that providing these new nations with laws commensurate with their rapid development and future economic and social growth may constitute the paramount challenge for legal science in the second half of this century; and legal craftsmen from many countries of a sufficiently high technical-legal standard — i.e., mostly from the so-called Western nations — may increasingly be called upon to be instrumental in devising or modernizing law in African and Asian countries. A number of lawyers have already furnished such “legal developmental aid” in recent years — performing a recommending function as governmental advisers in the new lands, actually drafting new prescriptions, participating in conferences devoted to this new field of legal endeavor.¹

Many lawyers involved in such activity, however, may not as yet be sufficiently aware of the philosophical implication of performing legal tasks in a culture area other than their own. The almost total absence of discussion concerning the relation of law and culture in current legal literature supports such a suspicion. What has now become a matter of course to sociologists, psychiatrists, peace corps members or — even — missionaries active abroad, that cultures are integrated systems of a high degree of diversity, with unique, delicately structured value patterns, has not yet, it seems, been fully realized by the legal profession.² Perhaps understandably so. Lawyers are originally trained to shape value processes in the national, intracultural arena. As few doubts as to the justification of the basic tenets of a given legal system prevail, they are — particularly in civil law countries — prone to think of “law” as a self-contained set of rules, regulating social processes, but basically isolated from changing social reality. Thus they conceive of legal techniques, perhaps of entire codes, as features that can easily be transplanted and applied elsewhere (with minimum adjustments, if any). Usually overlooked is the task of viewing as part of the total culture the value

1. A list of such cross-cultural legal undertakings is compiled in Henning Wegener, *The Role of the Legal Advisor to Newly Independent African States* 71 (1962 — MS, Yale Law School Library).

2. Cf. B. Malinowski, *Practical Anthropology*, 2 AFRICA 31 (1929); or E. Adamson Hoebel, *The Study of Primitive Man*, in SOME USES OF ANTHROPOLOGY 73-76 (The Anthropological Society of Washington, Washington, 1956).

processes such prescription sets in motion. Moreover, the high level of abstraction of prescriptive language is conducive to errors of this type. There is no change of "tools" in the culturally different environment to caution the legal draftsman. In most of the new countries he finds a body of law, dating from colonial times, that is already couched in Western legal language. The lawyer continues to work with familiar terms, and may not realize the different cultural heritage behind them. He is led to indulge in intracultural biases in favor of accustomed ways of prescription.

Under these circumstances, one does well to emphasize that, in a cross-cultural context, there is need for insight into law's dependence on the values of a culture. Otherwise, recommendations put forth by Western lawyers in the new lands may lack the necessary degree of compatibility with indigenous value patterns.

It may seem possible to avoid cultural conflicts by sticking to questions of means. High-level value premises are, after all, logically incomplete.³ Ultimately they must be supplemented by the ascription of operational indices to each individual value in particular empirical contexts.⁴ Clarification, on a high level of abstraction, of primary biases and ultimate objectives is, nevertheless, indispensable, and will unmistakably be reflected in outcomes of specific decisions.⁵ Only the superficial observer would believe that detailed "practical" problems of drafting and recommending do not require firm commitment to an ultimate, ideal legal order, amenable as such problems may appear to be solved on an ad hoc basis of intermediate and short-range objectives.

It is on this highest level that the most crucial problem of "legal developmental aid" becomes prominent. To what extent can and should legal decisions reflecting the value order of a given culture, be transferred to a different cultural arena? Should the lawyer engaged in lawmaking in a culture not his own apply his accustomed moral and legal philosophy, or should he defer to possibly different value aspirations? And if he is to import some of his native value patterns, may he also avail himself of the institutional answers that have been found for their realization in his own legal culture? Or should he give emphasis to indigenous institutional machinery? To what extent, in short, should his goals depend on the culture in which he works, and vary with the empirical fact of cultural diversity?

It is clear that all possible answers to the question of the cross-cultural applicability of Western legal principles can be conceived of as arranged on a continuum of thought reaching from complete value relativism to extreme value absolutism — or, under the culturological angle here emphasized, from cultural relativism to cultural absolutism. If one should caution the Western lawyer not to move too heavily towards the "absolutism" end of the scale, caution in the

3. See, for instance, HANS KELSEN, *REINE RECHTSLEHRE* 91, 98 (1934).

4. Myres S. McDougal, *Perspectives for an International Law of Human Dignity*, *PROCEEDINGS OF AMERICAN SOCIETY FOR INTERNATIONAL LAW* 107, 112 (1959).

5. Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, in *STUDIES IN WORLD PUBLIC ORDER* 947 (1960). A serviceable overview of the most important twentieth century attempts to identify highest values on a scientific basis, is contained in ARNOLD BRECHT, *POLITICAL THEORY* 302-363 (1959).

opposite direction seems equally advisable. Once the lawyer does wake up to insights into the cultural relatedness of legal processes, he often becomes so impressed with this important discovery that — intuitively — he takes a relativistic outlook, and proclaims cultural relativism the only valid standard for judging cross-cultural legal phenomena. It would thus appear useful to examine what philosophers of culture have to say about the justification of a relativistic outlook, and what bearing their theories have on the process of lawmaking in the new nations.

II. CULTURAL RELATIVISM

In 1947 a number of prominent American anthropologists enunciated a fervent warning against the transcultural application of Western concepts of law, and, especially, of human rights as understood by Western nations.⁶ Their proclamation was expressly based on the theory of value relativism in its application to cultural diversity, i.e., on cultural relativism. The theory is still fashionable enough to command a sizable following among anthropologists.⁷ What precisely does it say? Cultural relativism asserts in its broadest form that human thought and conduct are relative to the cultural background out of which they arise.⁸ The theory will here be considered as restricted to value judgments; discussion of the influence of enculturative experience in other realms of cultural learning is omitted.⁹ Still, the term remains so ambiguous as to have caused a good deal of confusion in the pertinent literature. I have been able to distinguish three different component theories that have at various times been labeled cultural value relativism.¹⁰

The term has, first, been employed to designate the fact of cultural diversity with regard to value perspectives.¹¹ That empirical value perception differs in various cultures is so obvious as to be beyond controversy, although noteworthy attempts have been made to establish the universal acceptance of at least certain highest moral values.¹² This part of the theory is merely descriptive, and emphasizes degrees of difference; and it should be noted that, in accordance with the

6. See the *Statement on Human Rights*, 49 AMERICAN ANTHROPOLOGIST 539-543 (1947).

7. See the survey by David Bidney, *The Concept of Value in Modern Anthropology*, esp. "Cultural Relativism and the Transvaluation of Values," in A. L. KROEBER (ed.), ANTHROPOLOGY TODAY 682, 689 (1955). And see Jacques Maquet, *Le Relativisme culturel*, 22 PRÉSENCE AFRICAINE 63 (1958).

8. MELVILLE HERSKOVITS, MAN AND HIS WORKS 63 (1948).

9. For such discussion, see HERSKOVITS, *ibid.*; Herskovits, *Some Further Comments on Cultural Relativism*, 60 AMERICAN ANTHROPOLOGIST 266 (1958); with regard to the latter see Robert P. Sylvester's critical comments in 61 AMERICAN ANTHROPOLOGIST 882 (1959).

10. A good example of such confusion is contained in the discussion, *Human Dignity and the Varieties of Civilization*, 3 SCIENCE, PHILOSOPHY AND RELIGION 245 (1943). Even Redfield appears to be guilty of confusing the methodological and normative aspects of the theory: THE PRIMITIVE WORLD 144 *et seq.* Other examples could be adduced by the score. A fourfold distinction similar to the above is introduced by Paul F. Schmidt, *Some Criticisms of Cultural Relativism*, 52 JOURNAL OF PHILOSOPHY 780, 782 (1955). And see HERSKOVITS, CULTURAL ANTHROPOLOGY (1955), who distinguishes descriptive, methodological, and normative aspects of cultural relativism, but accepts all three as constituting a "logical sequence"!

11. See Schmidt, *op. cit. supra* note 10, at 782.

12. See note 5 above. Particularly relevant to our topic is Iredell Jenkins' attempt to formulate a "Common Law of Mankind."

Kantian "gulf theory"¹³ of a strict logical separation of "is" and "ought," no statement about the relative value of any one culture is, as yet, implied.

Secondly, cultural relativism is often taken to mean that cultures can only be understood in their own terms, "according to the way the people who carry that culture see things."¹⁴ Cultural relativism is here seen as a methodological principle for the exploration and comprehension of alien cultures. No final preference for any culture or value is expressed during the investigatory stage; judgment is suspended until the evidence is in. The principle restates the necessity of scientific objectivity, of intelligence in the making of inferences, of impartiality during the rational exploration of cross-cultural phenomena. These methodological truisms are advanced so that the scientific study of cultures may be a corrective of uncritical ethnocentrism.¹⁵ Complete neutrality of the foreign observer in the assembling and coordinating of data, can, however, only remain an ideal. Redfield has admitted the impossibility of divesting oneself completely from all value judgments in the course of anthropological field work.¹⁶ Intuitive value judgments are an integral element of factual perception.¹⁷ They can only partly be eliminated by rational clarification of one's own biases, and by a rigorous insistence on documentation and empirical verification. More important, only a very personal, sympathetic relationship between a culture and its student allows for the full comprehension of an alien value system and its intricate interdependence which are the desired outcomes of cross-cultural research.¹⁸ The preservation of "subjective sympathy with his material while maintaining an extra-cultural objectivity"¹⁹ thus becomes a precarious dilemma for the student of culture — and surely enough for the lawyer; but practical approximation of this goal appears possible.²⁰

It is the third interpretation of cultural relativism that is most relevant in this context. Here finally the question of the comparative merit of cultural values is being posed. The relativist's reply is simple. All cultural value systems are "equally valid" since there can be no value judgments that are objectively justifiable independent of specific cultures.²¹ No techniques of qualitatively evaluating cultures have been discovered, and one must therefore suspend judgment altogether, trying to act and regard other culture systems as if they were of equal

13. This handy term has been introduced by BRECHT, *POLITICAL THEORY*, who gives an excellent and comprehensive account of "Scientific Value Relativism."

14. ROBERT REDFIELD, *THE PRIMITIVE WORLD* 144 (1953).

15. Paul Taylor, *Social Science and Ethical Relativism*, 55 *JOURNAL OF PHILOSOPHY* 32, 41 (1958).

16. *Op. cit. supra* note 14, at 153, 154.

17. We could reasonably base this statement on the theory of the intuitive, a priori nature of value judgments as established by the phenomenological school. See N. HARTMANN, *ETHICS* 95, 103, 105 (1926); similarly, G. E. Moore's value intuitivism. Redfield seems to share this epistemological standpoint, *op. cit. supra* note 14, at 154.

18. Redfield emphasizes the indispensability of both, the sympathetic "inside view," and the sober, objective "outside view," *THE LITTLE COMMUNITY* 81 (1955, 1960); *THE PRIMITIVE WORLD* 154.

19. JOSEPH FURNAS, *THE ANATOMY OF PARADISE* 478 (1936).

20. See Schmidt, *op. cit. supra* note 10, at 790.

21. In Ruth Benedict's famous words, "accepting . . . the coexisting and equally valid patterns of life which mankind has created for itself from the raw materials of existence." *PATTERNS OF CULTURE* 240 (1934, 1959).

validity, even though it may be difficult to believe that they are.²² All coexisting patterns of culture have to be met with equal respect; cross-cultural tolerance is the order of the day.²³ Hence any postulation of universal values or rights, as in the Declaration of Human Rights, must be opposed for fear of encroaching upon the freedom and potentially different values of a given society.²⁴ The implications of such a normative thesis of relativism are clear. The foreign lawyer of our study would be compelled to refrain from any application of his own concepts of human dignity, human rights, etc., and would have to seek out, and convert into legal prescription, the indigenous value perspectives, no matter how contrary they were to his own identifications and demands.

III. ARGUMENTS AGAINST CULTURAL RELATIVISM

Of the three component theories of cultural relativism, I suggest that the lawyer should accept the descriptive one as borne out by empirical studies; postulate the second, methodological one as an indispensable tool of cross-cultural legal work; and reject the third, normative theory as contradictory and unjustifiable. My reasons for this rejection of "normative" cultural relativism are fourfold:

1. *The logical argument.*—A strictly relativistic theory of values is self-defeating, since the normative proposition "all normative statements are only true within a given culture" claims to be universally true, and thereby becomes self-referentially inconsistent.²⁵ The theory is likewise contradictory insofar as its positive aspect, the affirmation of intercultural respect and tolerance as absolutely true values, is allegedly derived from the thesis of relativism. However, since it is not only theoretically possible, but empirically proven that a given culture *A* may value intolerance and disrespect, and *A*'s normative assumptions are as valid as the extracultural observer's beliefs, no logical choice between tolerance and intolerance is possible.²⁶ We might just as well hate all other cultures and their legal tenets.²⁷ Finally, "there can be no mutual respect for differences where there is no community of values also"²⁸; the existence of common objective cultural values is logically postulated by any plea for tolerance.

2. *The ethical argument.*—The standard ethical objection against value

22. Bidney, *op. cit. supra* note 7, at 693.

23. Herskovits introduces one limitation: see footnote 9 *supra* on his supplementary theory of latent values.

24. See the *Statement on Human Rights* (note 6 *supra*), drafted by Herskovits on behalf of the executive board of the American Anthropological Association, and submitted to the United Nations Commission on Human Rights.

25. A theory is self-referential if it is included in its own subject matter. If a self-referential theory *T* implies that *T* has the property *P*, and if *T* in fact does not have the property *P*, then *T* is self-referentially inconsistent. See F. B. FITCH, *SYMBOLIC LOGIC* 219 (1952). Pointing to inconsistencies of this kind is a standard method for the refutation of philosophical theories. Its meaningfulness has recently been reestablished by FITCH, *ibid.* 217-225, against earlier attacks by Bertrand Russell.

26. Taylor, *Social Science and Ethical Relativism* 55 *JOURNAL OF PHILOSOPHY* 32, 34 (1958); ARTHUR MURPHY, *THE USES OF REASON* 157-158 (1943).

27. REDFIELD, *THE PRIMITIVE WORLD* 147; Homer Barnett, *On Science and Human Rights*, 50 *AMERICAN ANTHROPOLOGIST* 352 (1948).

28. Bidney, *op. cit. supra* note 7, at 694.

relativism is that the theory condones, say, cannibalism or Nazi laws, as soon as they are included in the social code of a given culture. Herskovits' assumption²⁹ that in such cases of grave violation of standards that are widely accepted elsewhere, certain latent, underlying intracultural values could be resorted to; and that these values would entitle those discovering them to intracultural resistance, has hardly been a convincing counterargument. To the extent that outside guidance in the discovery of such latent perspectives is recommended, it is indeed inconsistent with the thesis of relativism.³⁰ A second argument notes that relativists fail to make deliberate choices between divergent value patterns, and take the lack of scientific affirmation of values as a pretense for not setting up any ethical standards at all. In a word, complete relativists sidestep responsible value decisions by proclaiming tolerance and neutrality, and may finally adopt an attitude of ethical indifference.³¹ The relativists have replied that their ethically neutral approach means "not that we are to value none of them, but that we are to value all of them"³²; they have professed an understanding attitude of "neutrality for everybody."³³ This rejoinder is far from being convincing. It is meaningless to embrace lovingly the variety of legal cultures, because conflicts inevitably occur between different standards; and if values clash, one must make a decision — a decision which will imply universalization of values in violation of the thesis of relativity³⁴ — or refrain from deciding, which is nothing but ethical indifference.³⁵ A general sense of respect for other cultures is not enough, unless it is supplemented by a firm personal value system; otherwise, such respect becomes identical with moral passivity. For the legal draftsman who is supposed to come up with unequivocal prescription, the deficiencies of this approach are particularly obvious.

29. In the *Statement on Human Rights*, *op. cit. supra* note 6, at 543.

30. Bidney, *op. cit. supra* note 7, at 693, 694; REDFIELD, *op. cit. supra* note 14, at 148.

31. Relativists usually point to the dangers of uncritical imposition of Western ideals upon native cultures, and the devastating results of many actual cases of interference, which have resulted in detribalized, demoralized natives who have lost their self-respect and the will to carry on their cultural existence. But this is no argument against total rejection of cross-cultural value judgments.

All absolutes are not necessarily ethnocentric, and all cultural ideologies are not of equal value. Belief in transcultural absolutes, in rational norms and ideals which men may approximate in time but never quite realize perfectly, is quite compatible with a humane policy of tolerance of cultural differences. . . . To urge cultural *laissez faire* because of the ethnocentric follies and crimes of the past is a counsel of despair which fails to face the real issues which confront mankind. Bidney, *op. cit. supra* note 7, at 697.

32. REDFIELD, *op. cit. supra* note 14, at 146, interpreting Ruth Benedict.

33. *Id.* at 147.

34. As even Herskovits confesses. "There is no living in terms of unilateral tolerance, and when there is the appeal to power, one cannot but translate enculturated belief into action." *Some Further Comments on Cultural Relativism*, 60 *AMERICAN ANTHROPOLOGIST* 266, 272 (1958). What Herskovits would not admit is that such action is more than a compulsory reflex in the straitjacket of enculturation, and can represent an ethical decision to which we can ascribe transcultural validity. He would thus stifle many projects of technical assistance: the Peace Corps assistant who introduces agricultural changes against the perspectives of a primitive tribe, could not be awarded the predicate of ethical behavior. Should he remain entirely passive?

35. McDougal, *op. cit. supra* note 4, at 121.

3. *The political argument.*—The question of highest values cannot be considered apart from the events that shape the contemporary world social and legal processes. In a time which irreversibly draws together continents and societies that have been separate before, which increases the scale of communication of the most isolated folk societies and tremendously multiplies the network of global interdependence, cultural relativism appears particularly inappropriate. The thesis can historically be linked to political isolationism and traditional interpretations of the nonintervention principle in politics and law.³⁶ It could, with tolerable results, still be applied with respect to basically isolated small-scale folk societies, such as anthropologists have preferably sought out for their case studies. As even these societies come to be participants in a growingly intensive process of interaction on a global scale, the doctrine of cultural and legal relativism not only becomes increasingly more difficult to maintain,³⁷ but protracts ideological conflicts without pointing the way to any kind of rational solution. Even the most idiosyncratic moral patterns are raised to the level of the most common. As national value processes more and more affect the world community at large, correspondingly inclusive value perspectives must prevail. Lacking any potentialities for conflict-solving, cultural relativism fails to provide the guidance for political decision processes that must by necessity become cross-cultural in their effects.

4. *The practical argument.*—If cultural relativism were to be accepted as the normative basis for legal work in the new countries, empirical problems would arise that might well stultify the Western lawyer's attempts to defer to the country's own cultural premises. Rapid social change of a highly uneven nature, the existence of several, possibly conflicting indigenous cultures of various states of disorganization within the national territory,³⁸ the difficulties inherent in projecting the quality of incipient value reorientations — all such phenomena will render the precise identification of the country's ultimate expectations practically impossible. Significant economic legislation seeking to chart the country's economic future by establishing new value processes may not be grounded at all in cultural traditions. In all these cases, a foreign lawyer must fill in from his own preferences and experiences unless he wants to find himself lost in a mass of incoherent data. Likewise, where his task comprises, as will so often be the case, the integration and reconciliation of diverse perspectives, he needs a value scale of his own as a yardstick for possible satisfactory solutions.³⁹ Cultural relativism fails him; it supplies no such standard.

36. Philosophically, it could be related to both a radically empirical epistemology, and the insights of sociological, ethical and legal thinking into the connections between environment and cultural biases (functional anthropology). See F. S. C. Northrop, *Cultural Values*, in KROEBER, *op. cit. supra* note 7, at 668, 674. But cf. Bidney's discussion, *id.* at 689, of some traces of continental-idealistic thinking in Herskovits' philosophical premises.

37. REDFIELD, *op. cit. supra* note 14, at 145, joins in this prognosis.

38. Maquet, *op. cit. supra* note 7, wants to base the need for an attitude of cultural relativism on the multicultural nature of the new African states. But his reasons — here as elsewhere in his article — remain extremely vague.

39. On the difficulty of striving for objectivity in this undertaking, cf. Redfield's remarks, *op. cit. supra* note 14, at 150.

IV. CONCLUSION

If, with the present writer, one arrives at the conclusion that complete cultural relativism can hardly serve as a valid normative theory and a basis for cross-cultural lawmaking, one would surely conclude that at least *some* highest values must be absolutized to guide new lawmaking. Whether they are freely postulated, or whether they are justified in terms of metaphysical insights, "natural law," or contemporary "science of value" is not under discussion here; nor is the extent to which they should thus be transplanted.

One pertinent reminder, however, may be offered as a closing remark. Even if some highest values are validated for transcultural application, the attainment of these values can be reached by various institutional solutions which take account of cultural diversity. In policy shaping, climbing down the ladder of abstraction is not an automatic process, and many different types of structures and institutions may effectively serve the promotion of values expressed in adopted overriding policies. "When its basic goals are accepted, a . . . law of human dignity can tolerate, even encourage, many different cultural modalities for its implementation," McDougal states in advocating universal acceptance of some basic principles characterizing Western law.⁴⁰ The lawyer who rejects cultural relativism as insufficient, should balance his attitude, and maintain mental flexibility by thoroughly exploring an important phenomenon: the "potential equivalence of institutions."⁴¹

HENNING WEGENER

40. McDougal, *op. cit. supra* note 4, at 121. See also, McDougal, *op. cit. supra* note 5, at 961.

41. On this basis, some preliminary "methods" for cross-cultural lawmaking have been suggested, *op. cit. supra* note 1, at 343-393.